United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be Argued by
HAROLD BAER, JR.

75-1194

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1194

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ARNOLD PERER,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF FOR DEFENDANT-APPELLANT ARNOLD PERER

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ARGUMENT

ENTRAPMENT MUST BE FOUND AS A MATTER OF LAW

This brief is submitted on behalf of appellant Arnold Perer in reply to the brief filed by the United States. We confine ourselves here to responding to Point I of the Government's brief regarding appellant's entrapment defense.

In our principal brief we argued that the evidence established entrapment as a matter of law under each of three alternative arguments:

1. The Government induced the defendant to commit the crime charged without having a predisposition to do so, so that entrapment must be found as a matter of law;

2. The Government's conduct exceeded the bounds of fundamental fairness so that under the Russell exception entrapment must be found as a matter of law;

3. There is entrapment as a matter of law where Governmental conduct is blatantly improper and where proof of predisposition is disputed, and at best, slight.

The Government responds by urging that there was sufficient evidence of predisposition to support the jury's guilty verdict. In demonstrating Perer's readiness to respond to the Government's inducement, the Government limits itself to events taking place during the period beginning on October 14,

1973, the day Mazzilli allegedly met Perer for the first time,[1] and continued through December 9th, the date of Perer's arrest. Whether done knowingly or not, this approach misses the point completely. It is the earlier three month period between mid-July and October 14th in which Perer was cajoled, exhorted and importuned to engage in the conduct charged in the indictment. It is this period which was overlooked or simply avoided by the Government on which Perer relies. Therefore, the Government's view of the relevant time period is completely myopic.

The crux of an entrapment defense is the determination of whether or not the defendant was predisposed to commit the offenses charged. See Russell v. the United States, 411 U.S. 423 (1973). In measuring the defendant's readiness of the defendant to respond to the Government's inducement the court

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1. There is a dispute as to when Mazzilli first met Perer, which has a bearing on the length of Mazzilli's undercover involvement. Mazzilli testified that his first face-to-face meeting with Perer occurred on October 14th (Tr. 73). However, both Rojas and Perer testified that Perer was first introduced to Mazzilli in July (Tr. 148, 158, 240, 251). Contrary to the Government's assertion that Rojas was unsure of this date, the record clearly shows that Rojas testified confidently that Perer met Mazzilli in July. On direct examination, Rojas testified as follows:

   "Q. You are convinced that the first time you introduced Mr. Mazzilli was in the summer of '73?

   A. Yes, I am pretty sure." (Tr. 158).

will consider all government involvement. Here, that involvement commenced in mid-July at the time Rojas began cooperating with the Government as a government informer.[2] Rojas' substantial involvement continued for three months prior to the additional involvement of Mazzilli and D'Atri beginning on October 14, 1975.[3] In this regard, Rojas testified that between July and September, he visited Perer at his home for the purpose of discussing the purchase of guns approximately fifteen or twenty times in addition to telephoning him on a number of occasions (Tr. 156, 159). Rojas continued to make frequent visits to Perer for the same purpose in October before and after agents Mazzilli and D'Atri took over the primary responsibility of the undercover operation.

It is beyond peradventure that this earlier period constituted a major thrust of the undercover investigation of defendant Perer. Perer resisted the continuous Government pressure during this time. In making this assertion, appellant is cognizant of Rojas' testimony that while acting as a government informer, he bought guns from Perer and Hochman behind the

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2. It is undisputed that Rojas acted on behalf of the Government during that period. Mazzilli corroborated that Rojas became a government informer following his arrest on July 16, 1973 (Tr. 74-75).

3. Same as footnote 1.

agents' backs to make a few dollars (Tr. 160). If such gun sales took place at all, it is highly unlikely that they occurred during the July 16 - October 14 period. Since Rojas was clearly cooperating with the Government for the purposes of obtaining leniency in his own pending case (Tr. 149, 153), it was in his own interest to report at least the first of such transactions to the agents in charge of the investigation. In light of the fact that the Government produced no evidence of gun sales by Perer during this first three month period it is doubtful that such sales actually occurred at that time. Indeed, it could be reasonably inferred that since no sales were made by Perer to the Government's special agents during this period, the investigation needed to be accelerated. Consequently Mazzilli and D'Atri were visibly injected into the investigation to a greater extent beginning on October 14. It is against this background that predisposition must be judged.

It is of particular importance that Rojas, as the government informer corroborated Perer's testimony concerning the frequency of his visits to Perer from July to October. The value of having a government informer corroborate the defendant's testimony is not negated by the fact that Rojas was called by the defense. Rojas was not the ordinary defense witness. In fact, he had been prepared as the Government's witness (Tr. 164)

and the Government advised the jury that he would be called as such (Tr. 6). However, the Government did not in fact call Rojas. As a consequence of the Government's eleventh hour decision not to call him, the defendant was "forced" to call Rojas in order to sustain his entrapment defense. Rojas was the only one who, other than the defendant, could provide evidence as to the intolerable degree of the Government's pressure to which Perer initially resisted but to which he finally succumbed.

Furthermore, contrary to the Government's assertions in the first footnote on page 6 of its brief, Rojas was treated as a hostile witness. Although not officially declared a hostile witness by the court, the court recognized that Rojas might in fact be hostile under the circumstances, and therefore approved of treating him as such, if necessary (Tr. 129). At the commencement of Rojas' testimony it was apparent that he should be treated as a hostile witness. Thereafter defense counsel was permitted, without objection, to interrogate Rojas with leading questions which is the appropriate method of examining any hostile witness. McCormick, Evidence §6 (1972). Moreover, many of the questions showing bias, prior inconsistent statements, and Rojas' past criminal record (Tr. 150-153) were apparently propounded for purposes of impeachment. See United States v. Freeman, 302 F.2d 347 (2d Cir. 1962), cert. denied, 375 U.S. 958 (1963).

We submit that the Court should focus its attention on the period between July 16, 1973 and October 14, 1973 in determining predisposition. In doing so the Court should consider the additional arguments contained in Point I of the appellant's brief which not only refute any suggestion of predisposition on the part of the defendant in this case, but affirmatively demonstrate that there was entrapment as a matter of law.

CONCLUSION

For the reasons set forth herein, the conviction of defendant Arnold Perer should be reversed on both counts.